EMPLOYMENT TRIBUNALS

Claimant: **Mr P Collins**

Respondent: **ISS Facilities Service Ltd**

Heard at: **Sheffield** **On: 7 May 2019**

Before: **Employment Judge Rostant**

Representation

Claimant: Mr N Sharples GMB Trade Union
Respondent: Mr S H Moon, consultant

RESERVED JUDGMENT

The claim of unfair dismissal is upheld.

Compensation is reduced by 5% for contributory fault and by 40% to reflect the chances of a fair procedure resulting in the claimant nevertheless losing his job.

REASONS

1. The claimant brought a claim of unfair dismissal, breach of contract and unauthorised deduction from wages in a claim form presented on 9 January 2019. The respondent defended the claim and the matter was set down for hearing for one day on 7 May 2019.
2. The parties complied with case management orders and on the day of the hearing I had available to me witness statements for all of the relevant witnesses and a file of documents running to 312 pages. After the bundle had been finalised, a supplementary bundle was agreed and added to the file thus adding a further 23 pages of documentary evidence. At the hearing, I heard from Mr D Tulip, mechanical and electrical supervisor, Mr A Wilde, cluster manager northern region and Mr N Aston, formerly senior technical operations manager, for the respondent. I also heard from the claimant.
3. There was sufficient time on 7 May to hear all of the evidence from the parties' witnesses but insufficient time to deal with submissions or to reach a judgment. For that reason, I adjourned the proceedings and re-listed for a Reserved Judgment on 30 May 2019. In accordance with my orders on 7 May 2019, the parties each submitted written submissions for my consideration.

The issues in this case

4. The parties agreed that the issues in this case are as follows.

    a. In respect of the claim of unfair dismissal, the respondent admitted that the claimant was dismissed. The parties agreed that the reason for the dismissal was some other substantial reason namely third-party pressure. The claimant therefore agreed that the dismissal was for a potentially fair reason. The claimant did not agree however that the dismissal was fair in all of the circumstances contemplated by section 98(4) of the Employment Rights Act 1996 and, in particular, contended that the respondent failed in its obligation to seek alternative employment for the claimant as a way of avoiding dismissal. The respondent did not accept that and contended that all that could be reasonably expected of it was done. The Tribunal therefore had to decide that contested issue.

    b. The respondent's position was also that if the claim of unfair dismissal was found to succeed the Tribunal should consider whether or not any deduction of compensation should be made to reflect the possibility that a fair and proper procedure would still have resulted in the claimant's dismissal (**Polkey v A E Dayton Services Ltd** [1987] ICR 142). The respondent also pursued an argument that the claimant had contributed to his dismissal.

5. The claim of breach of contract was not pursued and that is because it is agreed that the claimant was dismissed on full notice. The claim of unauthorised deduction was conceded by the respondent and dealt with in a separate judgment.

The law

6. Section 98 of the Employment Rights Act provides that where a claimant has been dismissed, the Tribunal must first consider whether the respondent discharges the burden resting on it to show a reason for the dismissal and that that is a potentially fair reason. The respondent relies upon third party pressure, which is capable of amounting to a substantial reason. Once the respondent discharges that initial burden upon it, the focus moves away from an evidential and legal burden on the respondent to the question of fairness to be decided on a neutral burden of proof. The Tribunal must decide whether on all of the evidence before it, bearing in mind the size and administrative resources of the respondent and all of the circumstances of the case, the respondent was reasonable in treating the reason for dismissal as good grounds for dismissing the claimant.

7. In the particular issue of third party pressure cases, the authorities focus on the duty upon the employer to avoid or mitigate any injustice to an employee potentially to be dismissed at the behest of a third party. The decision of the Employment Appeal Tribunal in **Henderson v Connect (South Tyneside) Ltd** [2010] IRLR 466 deals with cases where it is obvious that the employee has suffered an injustice by reason of the third parties' decision that he is no longer welcome on their premises. The judgment of the EAT contains a full survey of the relevant authorities and concludes that the appropriate question for the Tribunal is whether or not the employer had done "all it could reasonably be expected to do to assist the claimant and prevent him from

losing his employment". In paragraph 21 of its judgment, the EAT states that in a case of patent injustice it may be necessary for an employer to "pull out all the stops" but the rest of the judgment goes on to make it clear that the employer may, in the end, still be entitled to dismiss fairly even where there is no evidence that the claimant has done anything to bring about his own dismissal.

The agreed facts in this case

8. The respondent provides a variety of engineering services to clients and operates nationwide.

9. The claimant had been employed on what is known as the RBS contract since March 2006. The contract is to provide maintenance engineering services to that client at a variety of sights in the Yorkshire area. At the time with which this case is concerned, the contract was being carried out by the respondent company to whose employment the claimant had transferred in November 2017.

10. Before November 2017, the claimant had been employed on the same contract by Carillion and had been line managed by Mr David Tulip. Mr Tulip also transferred to the respondent's employment in November 2017 and continued to line manage the claimant.

11. Amongst the buildings on the RBS roster was the Cyan site at Wath-on-Dearne, where the RBS facilities manager was one Mr S Smith. The claimant was based there.

12. On 6 February 2018, Mr Smith forwarded a complaint from the employee of another contractor on the Cyan site in relation to a freezer delivery. The complaint was about the claimant's conduct.

13. Mr Tulip, and Mr Wilde, his line manager, received a copy of that complaint and on 14 February 2018, Mr Tulip attended the site to relate to the claimant the fact that Mr Smith in his email of 6 February was asking for a change of engineer and was expressing his dissatisfaction with the claimant.

14. Accordingly, Mr Tulip told the claimant that he would be suspended whilst he Mr Tulip carried out an investigation.

15. That investigation was carried out on 20 February 2018 and Mr Tulip concluded that the claimant was innocent of any wrongdoing.

16. Mr Tulip spoke further to Mr Smith who nevertheless maintained his objection to the claimant returning to the site and referred to previous incidents.

17. Mr Tulip also wrote to the claimant on 26 February, explaining the outcome of his investigation, setting out the fact that despite that outcome the client was refusing to allow the claimant back on its site, and inviting the claimant to attend a meeting in Leeds to discuss the matter. The claimant was to remain suspended on full pay until the date of that meeting.

18. That meeting took place on 14 March, by which time RBS had extended its ban on the claimant to all of its Yorkshire sites.

19. The respondent has a third-party pressure procedure for these situations (see pages 35 and 36 of the file). The procedure requires the following. First that the respondent itself investigate any complaint, second that if the respondent found the complaint to be ill founded it should seek to persuade the client to

remove its objection to the engineer attending their site and third, if the client continues to insist on the removal the respondent "will endeavour to re-locate or find suitable alternative employment for the employee". The procedure goes on to state that if that search is not fruitful, the respondent may ultimately dismiss for the potentially fair reason of third party pressure.

20. The task of finding alternative employment for the claimant rested on the shoulders of Mr Tulip. On 3 May 2018, Mr Tulip made a final request to Mr Smith to reconsider his decision. Mr Smith maintained his refusal. On 4 May 2018, Mr Tulip invited the claimant to what was to be a final meeting, the search for employment up to that point having not produced any results.

21. That meeting was not held because, before the meeting, the claimant submitted a grievance against Mr Tulip. The grievance was investigated by Mr Aston and he met the claimant on 25 May 2018. The meeting did not reach a conclusion and was adjourned.

22. Mr Aston wrote to Mr Smith on 31 May 2018 again asking for the ban on the claimant to be removed. He was met with the same answer as previously. Mr Aston then decided the grievance and did not uphold it.

23. He communicated his decision to the claimant and gave the claimant the opportunity to appeal. The appeal was to be dealt with by Mr Wilde and in consultation with the respondent's human resources team it was decided that the appeal against the grievance and the outstanding third- party pressure process would be dealt with at the same meeting.

24. That took place on 6 July and by letter of 12 July Mr Wilde rejected the claimant's appeal against Mr Aston's decision and confirmed the claimant's termination from employment.

My conclusions

25. The sole area of disputed evidence in this case concerns what steps the respondent took to obtain employment for the claimant and since those are the matters which are central to this case I shall return to the evidence and my conclusions on any disputes on that evidence in some detail. At this point however, it is possible for me to deal with other aspects of the question of fairness. In the first place, it is relevant to note that the claimant was aware as a result of the ISS company handbook and the third-party procedure referred to above, that his employment could be terminated as a result of third company pressure. (See **Dobie v Burns International Security Services (UK) Limited** [1984] ICR 812). The second point is that although references have been made in the respondent's witness statements to the possibility that the claimant may be at fault, at least in respect of previous incidents, the respondent is not seeking to advance a case that the claimant is in any way at fault. It follows that the removal from the site and the potential for that leading to the claimant's dismissal is exactly the kind of patent injustice that the judgment in **Henderson** has in mind. The respondent was therefore, required to "pull out all the stops", particularly in relation to the attempt to find alternatives for the claimant and to ensure that he was able to continue in employment. Finally, it can be said at this point that on the agreed facts there could be no suggestion that the respondent failed to carry out the important step of attempting to persuade its customer to permit the claimant to return to work on the relevant site. Indeed at least four such attempts were made and

they resulted in no change of heart by RBS and indeed, at a relatively early stage, an extension of the ban on the claimant to all of RBS's other sites.

The disputed factual issues

26. The claimant and Mr Tulip disagreed as to what the claimant was told during the meeting of 14 March. Mr Tulip contended that he told the claimant that the respondent's internal vacancies were all advertised on the respondent's intranet and that the claimant should look for work himself. The claimant contended that he was told no such thing and was instead told that Mr Tulip would put the claimant on the internal recruitment list advertising his availability to other managers looking for members of staff. I have concluded that it matters not which of those two versions is true, since Mr Tulip quite properly accepted that the responsibility for monitoring the availability of vacancies for the claimant rested on him and that it fell to him to take all the appropriate steps that the respondent needed to do in order to avoid unfairly dismissing the claimant. That duty is clear both from the respondent's own policy and from the case law.

27. The next question is what Mr Tulip did to discharge that obligation. He told me, and I accept, that he carried out a weekly monitoring exercise by searching the vacancies list by the use of key words. Mr Tulip gave evidence, which I accept, that he himself did not spot any suitable vacancies for the claimant. He was using the search terms "mobile", "engineer", "Yorkshire", "Leeds" and "Sheffield". Another process which might have resulted in the claimant being found work entailed the alerting to recruiting managers of the claimant's availability having been placed on something known as the retention list.

28. What is, however, not in doubt is that during the relevant period a vacancy for a Building Services Supervisor position, a job vacancy which contained the words "engineering", "Leeds" and "Yorkshire", came available but the claimant was not advised of it by Mr Tulip and the recruiting manager appeared not to have identified the claimant's availability as a potentially suitable candidate. It is also apparent that Mr Tulip failed to spot a Mobile Service Engineer position in technical services, which contained the words "engineer" and "Yorkshire".

29. Mr Tulip's explanation for that was that during the relevant period of time he had an extended three week holiday. He accepted that during that time he did not hand over to any other manager the task of finding employment for the claimant. It is relevant at this stage to consider that it was the respondent's view that an appropriate period of time for the search to continue was the period between the start of the search on 14 March and the putative termination of the claimant's employment on 5 May. In other words, just short of two months. If no active search was being carried out for three weeks during that period, during which it appears that two potentially suitable jobs were simply not notified by the respondent to the claimant, the respondent cannot be said to have, "pulled out all the stops". Although the claimant became aware of *those* two jobs by external means, it is impossible now to say what other jobs which might have been suitable for the claimant might have cropped up during those three weeks and been missed.

30. In addition to the Building Supervisor's post, the only other two potentially suitable jobs that the claimant was aware of where the technical services job

already discussed and the post of an Electrical Tester which was notified to the claimant the end of June, and in which the claimant expressed an interest on 6 July.

31. The technical services job was one which Mr Tulip became aware of but which he chose not to raise with the claimant because he concluded that, given the blanket ban for RBS sites, the claimant would not be able to carry out the role. I will deal with that in greater detail later in the judgment.

32. The respondent's submission on reasonableness starts with the admission that the respondent's handling of the claimant's position was not perfect but then makes the assertion that reasonable attempts were made to find alternative employment. The rest of the paragraph strikes me as nothing to the point as to the reasonableness of the respondent's efforts and instead focuses on the respondent's view of the claimant was not helping himself in the process. That is not, in my view, anything that will assist me in deciding the question of liability but instead goes to the question of whether or not there is a contribution on the part of the claimant or whether I should make any deduction for Polkey. In particular, Mr Moon's submission does not address the question as to why the claimant's full 12-week notice period could not have been used in the search for alternative work. The claimant was given 4 weeks' notice and then had his employment terminated, with the balance of the 8 weeks being paid in lieu. The claimant contends that that removed a further 8 weeks during which an alternative post could have been found for him. The respondent has advanced no reason for that approach to notice and has no answer to that aspect of the claimant's case.

33. The claimant's submission also relies as a ground of unfairness on the failure of the respondent to offer to the claimant the job of Electrical Tester. The evidence about that post is disputed and requires me, when addressing both the issue of liability and any potential **Polkey** reduction to make findings as to what did or did not happen.

34. There is no doubt that the claimant was made aware of the fact that there was an electrical tester's job, by way of an email of 25 June. The email alerted the claimant to the availability of three jobs, only one of which was potentially of interest and within the claimant's skill set. That was the job of "Compliance Technician: Electrical Tester". The claimant believed that it was possible that that was simply a PAT testing job which would have been remunerated on a minimum wage. He decided nevertheless to ask Mr Wilde about that matter at the scheduled meeting of 6 July. Following that meeting, the claimant emailed Mr Wilde and Mr James asking for information including salary, working hours and full job description for two jobs. The first was the Building Services Supervisor, recruiting manager Gillian Brooker, and the second was Electrical Tester, recruiting manager Mr Martin Halstead. That email was responded to by the claimant being notified that the Building Services job had been filled but that Mr Halstead wanted to know the claimant's locations for the electrical testing job. The claimant replied immediately giving his location as being Rotherham. Mr Wilde followed up with Mr Halstead (see page 183A) asking for more details of the job and was told that the claimant had the required qualifications but that he did not seem to have the relevant experience. The job was a field based fixed wire testing job earning a salary not of minimum wage but £28 to £30,000 p.a.

35. The key factual dispute is about what happened next. Mr Wilde in cross-examination asserted that he rang the claimant with that information. The claimant's case is that he heard no more about the job and assumed that Mr Wilde had found out that it was indeed the PAT testing job. I prefer the claimant's version of events. The documentary evidence shows that Mr Wilde, in following up on the Building Services job, emailed the claimant back with the information that the post had been filled. Furthermore, there is an email trail between the claimant and Mr Wilde about the electrical testing job at the earlier stage showing that Mr Wilde was, in general, communicating with the claimant by email. Mr Wilde in evidence could not recall having made the telephone call to the claimant but merely said he was sure that he would have made such a call. The claimant said that no such call was made. In support of that he asserted that had he been given such a call he would have pointed out that he did have the relevant experience. The claimant went on to outline, in his cross-examination and in a manner which was essentially unchallenged, why that was the case.

36. I find it inherently improbable that the claimant would have passed up the opportunity of a potentially useful opening if he had the information which Mr Wilde claims he would have had. I therefore prefer the claimant's version of evidence on this point and find that, for whatever reason, a potentially suitable job for the claimant was not offered to him. That was the second such job which, on the evidence before me, the claimant might have been suitable for and was not offered, the other being the Building Services post.

37. Taking all these failures together, I conclude that the respondent has not done all that was reasonable in the circumstances to avoid dismissing the claimant and I therefore uphold the complaint of unfair dismissal.

Contribution

38. In paragraphs 19 to 22, the respondent submits that the claimant contributed to his own dismissal, essentially by adopting a passive approach to the task of finding alternative employment and/or failing to respond when information was given to him. His behaviour the respondent contends could fall to be described as "bloody minded" and therefore capable of amounting to contribution – see **Nelson v British Broadcasting Corporation** (No 2) [1980] ICR 110.

39. In general terms I do not accept that the claimant's approach to finding alternative work was bloody minded. He was entitled to rely on the respondent to make the running and, with one possible exception, I see no evidence of him failing to follow up the limited opportunities that he was offered, at least where those opportunities represented the possibility of suitable employment.

40. That one limited exception relates to the Building Services Supervisor's post and that in turn depends upon the contested question as to when the claimant applied for the post. The respondent's case is that the claimant evinced no formal interest in that post until 6 July, when he raised the matter with Mr Wilde, causing Mr Wilde to follow up with the recruiting manager and resulting in the discovery that the post had been filled. The claimant, on the other hand contends that he formally applied for the post when he became aware of its existence. The claimant relies upon pages 110 to 116 of the file to demonstrate the fact that he did apply for the post on 4 May, through the

respondent's internal system. Whilst those pages show a completed application form, they do not prove that it was submitted. On the other hand, the respondent, in the preparation for these proceedings, conducted an enquiry internally to see whether or not such an application had been made (see pages supplementary paes19 to 20) and responses from the recruiting manager Gillian Brooker show that no such application was made. Furthermore, and more tellingly, the claimant failed to either follow up his application when he heard nothing at all about it, or mention the fact of the application at the various meetings that occurred after 4 May until the 6 July meeting. This is despite the fact that at those various meetings the Building Services Supervisor's post was discussed. There is no logical reason why the claimant would not mention the fact of an outstanding application for the post if he had made one. I take the view therefore that, on the balance of probabilities, the claimant did not apply for the post and his failure to do so may have had a small part to play in the ending of his employment. I take the view that appropriate contribution should be no more than 5%.

The possibility of a Polkey reduction

41. There are many uncertainties in this case. As I have already outlined, we do not know what vacancies might have been available and notified to the claimant had there been the appropriate constant monitoring of vacancies that the situation demanded. We do know about three potential posts which the claimant says he would have been suitable for.

42. The first post that I wish to deal with is that of the technical services post. This was a post for a Mobile Engineer. The respondent considered the claimant's suitability for that and rejected it on the grounds that the claimant would have been required to respond to calls 50% of which at the highest estimate, 40% at the lowest would have come from RBS sites. He would not have been able to respond to those calls given the blanket ban on him and the call would have had to have been passed off to another engineer, thus breaching the service level agreement which required the nearest engineer to be supplied. Although the submission on behalf of the claimant contends that no real effort was made to accommodate the claimant in that role, the claimant himself merely says it would have been easy for the respondent to accommodate him without explaining why. I found the respondent's evidence on this point convincing and I take the view that it was not required of the respondent to offer the claimant a job which he could patently not do.

43. This leaves the Building Services post and the Electrical Testing post. Had the claimant been notified in time and had made his application for the Building Services Supervisor's job there is no certainty that he would have been successful. The respondent has sought to produce evidence that the claimant lacked the relevant and necessary supervisory experience to make that job suitable for him. On this subject I found Mr Tulip's evidence to be persuasive. Whilst he accepted that the claimant had some supervisory experience, he went on to explain the level of experience required was of a different order. Although subsequent emails show that the recruiting managers, had they been aware of the claimant's candidacy, would at least have interviewed him, there is no certainty they would have been satisfied that he met the conditions for the job.

44. As to the electrical testing job, the claimant gave uncontested evidence that he had suitable experience for the post. It is evident from the email chain that the recruiting manager took the view that, on the face of it, he probably did not. That view would have formed a barrier which the claimant might or might not have been able to overcome had he been interviewed and it is difficult now to assess what his prospects of success would have been.

45. Overall therefore, the evidence before me shows that it cannot be said that the claimant stood no prospect at all of remaining in the respondent's employment had matters been conducted appropriately. The claimant might have found a job which might have cropped up whilst Mr Tulip had his eye off the ball. The claimant might have been successful in an application for the for either of the two potentially suitable jobs we know about. As to the likelihood of jobs cropping up in a general sense and which would have been available for the claimant had Mr Tulip spotted them or which might have come available during the balance of the notice period, a significant barrier however remained the fact that the claimant was barred from the premises of a very major customer.

46. The decision on **Polkey v AE Dayton Services Ltd** 1988 ICR 142, requires me to attempt to express, in percentage terms what chance the claimant would have had to remain in employment had matters been conducted fairly. I must do so even if, inevitably, that involves speculation. The respondent contends in all the circumstances that a Polkey reduction is appropriate and that it should be in the region of 60%. The claimant's submission makes no reference to any Polkey or contribution issues.

47. I am not prepared to make the reduction at that level. In particular in relation to the electrical testing job there seemed to me to be solid grounds for some optimism that the claimant might have succeeded. I am therefore prepared only to reduce the claimant's compensation by 40% and that in addition to the 5% contribution, making a total reduction of 45%.

Employment Judge Rostant

Date: 6 June 2019